IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-227

FEDERAL POWER COMMISSION, *Petitioner*

v.

CONSUMER FEDERATION OF AMERICA, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AMICUS CURIAE BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN CONDITIONAL SUPPORT

The Interstate Natural Gas Association of America (INGAA), having obtained the consent of all parties pursuant to Rule 42 of this Court, hereby submits this brief as *amicus curiae* in conditional support of Petitioner.

THE AMICUS

INGAA is a non-profit association whose members include most of the major interstate natural gas transmission companies subject to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (Act). Their operations account for more than 90% of the natural gas transported and sold annually in interstate commerce in the United States. INGAA has participated as an intervenor or *amicus curiae* before this Court and various U.S. Courts of Appeal in matters relating to Commission decisions. The instant petition presents issues of industry-wide significance in which INGAA's members are vitally concerned.

THE INTEREST OF AMICUS

The instant proceeding involves the question of the authority of the Commission to exempt 180 day emergency sales of natural gas to interstate pipeline companies from rate and certificate regulation. Order No. 491 extended, from 60 days to 180 days, the period of time that a pipeline experiencing a supply deficiency could make emergency purchases of gas without Commission certification under Section 7(c) of the Act. The Commission devised the emergency regulations to ameliorate the severe pipeline curtailments anticipated for the 1973-1974 winter heating season. Subsequently, in Order No. 491-A, the Commission proposed to *indirectly* regulate such "exempt" sales by reviewing the rates for emergency sales in pipeline rate proceedings.

Interstate pipelines, and their respective customers, are presently confronted with gas deficiencies affecting

high-priority markets far more drastic than in September 1973 when Order No. 491 was issued. The pervasive natural gas shortage has resulted in numerous industrial plant closures throughout the nation. The FPC Staff recently released a gas curtailment report projecting that shortfalls for the April 1975 through March 1976 period will be 45% greater than the curtailments actually incurred during the preceding twelve months.[1] It is apparent that INGAA is deeply interested in Commission measures designed to alleviate current and future pipeline curtailments.

ARGUMENT

INGAA fully supports the position and arguments set forth in the Brief in Conditional Support filed in this proceeding on September 11, 1975, by Texas Gas Transmission Corporation (Texas Gas) and Transcontinental Gas Pipe Line Corporation (Transco), both of whom are active members of INGAA. INGAA submits that the exemption proviso in Section 7(c) of the Natural Gas Act provides sufficient statutory authorization for the promulgation by the Commission of its emergency regulations. The Commission cannot be rendered helpless at a time when interstate pipelines are being forced to severely curtail their high-priority customers. The sales encompassed by the emergency provisions are short-term in nature and, thus, the exercise of Commission rate and certificate jurisdiction with respect to such transactions, as directed by the court below, is not only legally unnecessary but would also preclude the acquisition of additional gas supplies for the interstate market.

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[1] FPC Staff Gas Curtailment Report, June, 1975.

Consistent with the Act's requirement that adequate service to interstate consumers has to be maintained, the rates for emergency sales must be reviewed on the basis of the "prevailing market price." The Commission has repeatedly acknowledged that its emergency regulations were designed to allow interstate pipelines to compete with intrastate purchasers for onshore reserves *not otherwise available to the interstate market.* The introduction of other variables, such as producer costs, etc. (see Brief of Texas Gas and Transco, *supra,* pp. 15-17), into the Commission's proposed indirect rate regulation at the pipeline level is unwarranted. This Court has even recognized that in certain situations "the market price of gas would . . . coincide with just and reasonable rates." *FPC* v. *Texaco,* 417 U.S. 380, 399 (1974). Furthermore, given the risk of substantial refund liability, the utilization of any tests other than the prevailing market price standard will effectively preclude producers and pipelines from entering into emergency sales contracts. The whole purpose of the emergency provisions will have been thwarted and virtually all onshore supplies will continue to be sold in the unregulated intrastate market.

Finally, it should be obvious to this Court that Order No. 491 did not establish adequate standards to guide interstate pipelines in making emergency purchases. See *Texaco, supra.* As the court of appeals below stated:

> "In *Texaco* the Court was concerned with the *squeeze on the pipelines* which stemmed from making payments that would be both disallowed and nonrefundable, and made it clear that any such program would require '*guidance*' for those that

might be affected. [footnote omitted] *The warning in Order 491 against 'improvident' contracts does not provide adequate guidance to protect the pipelines."* (Emphasis added.) (FPC Pet., p. 26a)

The Commission, therefore, should be prohibited from refusing to permit pipelines to collect in their costs of service the full amounts paid to producers in connection with emergency sales consummated pursuant to Order No. 491.

Respectfully submitted,

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